

NON-BINDING ARBITRATION INITIATED 10/21/08  
PURSUANT TO  
DECREE OF MAY 19, 2003, 538 U.S. 720  
KANSAS V. NEBRASKA & COLORADO  
NO. 126, ORIG, U.S. SUPREME COURT

DEPOSITION OF DAVID L. POPE,  
produced, sworn, and examined on Monday, the 23rd day  
of February, 2009, between the hours of 8:00 o'clock  
in the forenoon and 6:00 o'clock in the afternoon of  
that day at Husch Blackwell Sanders LLP, 4801 Main  
Street, in the City of Kansas City, County of  
Jackson, State of Missouri, before:

JANE A. BLACKERBY, RPR, CCR  
Registered Professional Reporter  
of  
JAY E. SUDDRETH & ASSOCIATES, INC.  
Suite 100  
10104 West 105th Street  
Overland Park, Kansas 66212-5755

a Certified Court Reporter within and for the State  
of Missouri.

Taken on behalf of the State of Nebraska.

APPEARANCES

For the State of Kansas:

MONTGOMERY & ANDREWS, P.A.  
Attorneys at Law  
325 Paseo De Peralta  
Santa Fe, New Mexico 87501  
BY: Mr. John B. Draper

For the State of Nebraska:

HUSCH BLACKWELL SANDERS LLP  
Attorneys at Law  
206 South 13th Street, Suite 1400  
Lincoln, Nebraska 68508  
BY: Mr. Tom R. Wilmoth

For the State of Colorado:

MR. PETER J. AMPE  
First Assistant Attorney General  
1525 Sherman Street, 7th Floor  
Denver, Colorado 80203

Also Present:

Mr. Dale E. Book, P.E.  
Mr. Scott Ross  
Mr. Samuel Speed  
Mr. Christopher M. Gruenwald  
Mr. Burke W. Griggs  
Ms. Donna L. Ormerod  
Mr. Thomas E. Riley, P.E.  
Mr. Marc Groff, P.E.  
Mr. Gordon R. Coke, P.E.  
Mr. Marcus A. Powers  
Mr. James R. Williams, P.E.  
Mr. Justin D. Lavene

INDEX

	PAGE
DAVID L. POPE	
Direct Examination by Mr. Wilmoth	4
Signature:	40
Certificate:	41

EXHIBITS		
EXHIBIT		PAGE
NUMBER	DESCRIPTION	REFERENCED
14	Letter to Governor Kathleen Sebelius dated 2-14-03	15
15	Letter to Jack Wergin dated 4-18-05	16

DAVID L. POPE,  
of lawful age, having been first duly sworn to tell  
the truth, the whole truth, and nothing but the  
truth, testified as follows:

DIRECT EXAMINATION

BY MR. WILMOTH:

Q. Mr. Pope, how are you today?

A. I'm just fine.

Q. Could you please state for the record  
your name and current occupation?

A. Yes. It's David L. Pope. I'm a water and  
natural resources consultant.

Q. And do you consult on your own, in your  
own business or do you consult for a large entity?

A. On my own.

Q. And for whom do you consult?

A. In terms of clients, you mean?

Q. Yes.

A. I have several clients. One is the Missouri  
River Association of States and Tribes. A second one  
is the state of Kansas. A third client is Land and  
Water Company in western Kansas. I have also done  
some work, not active at the moment, but some work  
for a series of parties involved in litigation that  
asked me to assist them in helping to reach an

agreement in regard to a settlement dispute.

Q. Sort of mediation service?

A. Sort of -- I don't call myself a mediator formally, professional facilitator, but writing technical assistance, along that line, in terms of helping facilitate the agreement.

Q. And before we go any further, just as a matter of formality, any reason you could not testify truthfully and accurately today? Any medication you're on or anything like that would prevent you from --

A. That would be nice, but no.

Q. Fair enough. And are you under contract currently with the state of Kansas?

A. Yes, I am.

Q. And what's the scope of that service?

A. In a word, an advisor.

Q. On what matters?

A. A range of issues related to administration of water, both intrastate and, in particular, for interstate water issues.

Q. Interstate?

A. Uh-huh.

Q. So you work for the state in the Republican River arbitration matter. Is that

correct?

A. Yes.

Q. And you have some history with the state of Kansas, do you not?

A. Yes, I do.

Q. Could you just discuss that briefly for the record?

A. Yes. I work for the state of Kansas from 1978 through, I think it was May of 2007. I was assistant chief engineer for roughly the first five years and then became a chief engineer and director of the Division of Water Resources within the Kansas Department of Agriculture for the period 1983 through 19 -- 2007.

Q. And so you held that position during the period in which this litigation -- most recent round of litigation was initiated in 1998?

A. That's correct.

Q. And were you generally responsible for representing the state in negotiating a final settlement stipulation?

A. Yes, I was. I essentially led the settlement team for Kansas.

Q. Who was with you on that people?

A. The state members were myself, David

Barfield and Leland Rolfs as legal counsel. We also were assisted by Mr. Draper as counsel. Dale Book was actively involved as part of our team, and there were other people from time to time, particularly on committees and other aspects of the settlement. For example, Mr. Larson was involved in the modeling work, as was Mr. Book and Mr. Barfield, and occasionally there were other staff members that helped.

Q. And you occupied that position of chief engineer in '05 and '06?

A. I did.

Q. What are your general recollection from '05 and '06, if I can take you back, about any communications you might have had with the Kansas-Bostwick Irrigation District relating to the Republican River water supply?

A. I had some contact, fairly significant amount of contact, as I would recall, with the District, particularly its manager, and occasionally board members.

Q. Could you identify the manager of KBID?

A. Kenny Nelson. Can you restate the question? I forget the breadth of it.

Q. The question was related generally to

your communications with Kenny Nelson in 2005 and 2006 related to the availability of water in the Republican River.

A. Well, I did have significant contact with Kenny and the District as well as a number of other water users, as we had been involved in a period of substantial shortage of water that started much earlier than that but was continuing through 2006. And as a result of that, my office was involved in water administration. I supervised the overall responsibility of the Division in that regard. So there were lots of activity because so many users were being curtailed up and down along the river valley.

Q. Was that curtailment occurring as a result of administration by the state of Kansas or what entity was curtailing this?

A. Yes, my office was curtailing junior appropriators, that's correct, and the District was -- had been in a period and continued in a period of, I guess I would describe it as substantial shortages of water through the project. So it was an important issue and issue of substantial concern and activity. We also had at least some contact, I guess without checking the records I can't remember the



exact dates, but there were meetings and things of that nature that took place, I think, in particular, with groups like the Four States Irrigation Council. I know I appeared more than once during the period in general. I can't explicitly say which year or years there, but sometime in that certainly the 2003 through 2006 period.

Q. Post FSS?

A. Yes, post FSS, and about what was happening in regard to the implementation of the settlement and what was occurring.

Q. You mentioned a substantial shortage of water, and my question related to the Republican River. Is that what you're referring to, Republican River water shortage?

A. Yes, it is.

Q. Do you recall any discussion of alternative water supplies, such as groundwater that would be available to the District?

A. To the District?

Q. Yes.

A. I have some general knowledge of what's available to them, and that's very little, is the sum of that answer.

Q. Very little water or very little

knowledge?

A. Well, I hope it wouldn't be on the knowledge side, but certainly was on the water side. My historic knowledge, and with some depth of understanding of the District and its water supplies and its layout is, there's a very limited amount of the project lands that receive surface water through the Kansas-Bostwick Irrigation District that also have groundwater supplies available to them. Hundreds of acres, not thousands of acres. The District is, my observation, I guess, and knowledge of the situation is largely located up out of the valley, so it's not a situation where there's much groundwater physically available. There's some, perhaps, in the area, but not particularly in the lands that are actually served by surface water by the District of any big consequence.

Q. Okay. But are those lands within the KBID boundaries?

A. There may be some additional lands within the overall boundaries, because those often are very generally described as compared to the actual certified land. By reclamation it can receive water and it can be physically supplied with water.

Q. Is the certified land you referred to

generally this number, roughly 43,000 acres?

A. Yes.

Q. So if I understand what you just said, it's that there are less than a thousand acres that might receive both reclamation water and groundwater?

A. I wouldn't want to be held by a thousand acres, but 1,500, you know, a thousand, 2,000.

Q. Smaller than 5,000?

A. Oh, certainly, in my opinion, as I recall. More like the low number on the side. And it also, given the nature of the available groundwater in that area, those lands that did have wells weren't all that great. Particularly if the project is not running water because they're largely supplied by return flows and seepage from canals and laterals, so it's not a very robust groundwater system.

Q. So in your experience, prior to 2005 and 2006 during times of short water supply, what do the folks within KBID typically do? Not in '05 and '06. Just in your experience, what's a typical response when times are tough?

A. Well, both the District and the individual farmers assess their situation as best they can. They make -- the District has to make decisions in

regard to whether or not any water is available for delivery. That's done in conjunction with the Bureau of Reclamation based on storage at Harlan County and Lovewell.

Q. Do you know generally when that decision is made in the year?

A. As I recall, Reclamation provides estimates in the winter. It obviously has to be adjusted as the spring comes into play because of runoff conditions, but in general, it's a pretty good assessment early in the year, if I recall.

Q. So say by March?

A. Yes. Certainly earlier than that, yeah. Then or earlier. Individual -- the District, in turn, tries to provide as much information as it can to its members in terms of the expected available supply and the board is set a number of inches that they expect to deliver. Somewhere between zero and a full supply. There's certainly been some zeros in that mix in this period you mentioned. Then the farmers, in turn, have to decide what they will do, and just my experience in visiting with many of those folks and others is they -- there's a range of circumstances that some take more risks than others, but some will plant different crops because they

don't expect to have water. Some will be a little more risky and plant more field crops for the summer and hope for rain, so it's a mix of those things.

Q. Sure.

A. But they do have to make some pretty explicit decisions early on because of preparation of the land, fertility, chemicals, seed, all the things in terms of when a crop like corn, say, is going to be planted as compared to other crops.

Q. Do you have an opinion on kind of the time by which these decisions have to be made in a year?

A. Depends on the crop, but the --

Q. Let's say corn.

A. February, the latest, end of March. Corn is planted mid to late March. Can be some into April, depending on the varieties and season length and things of that nature, but they like to know in January, but it may be a little later.

Q. One of the things you mentioned earlier was that '05 and '06 was kind of the continuation of drought conditions and low water supply conditions?

A. Low water supply conditions. I don't think I mentioned drought.

Q. Do you recall folks in '05, '04, '05 talking about these decisions in the context of low water supply?

A. '05 and?

Q. '04, '05.

A. Yes. Low water conditions, yes.

Q. So low water conditions in '05 were no surprise relative to '04. I mean, this was a continuation of something that was happening?

A. Each year is always a little different, but I think the general pattern through the period had been very low water supply and that continued.

Q. Among the responses that you've seen, one of which I think you said was altering the crop mix and things like that, are you familiar with any programs that folks in KBID took advantage of that might offset the cost of lost product, maybe federal crop insurance program, maybe CRP program, conservation reserve program, maybe a reclamation drought relief payment?

A. There's certainly a range of programs generally available to producers. There may have been some relief through the last one you mentioned. I forget the exact title. I don't know too much about that, but there's -- their reclamation did try

to provide a little assistance, as I recall, during so-called drought period. There, of course, have been producers that enrolled in things like CRP. There probably is not very many CRP acres within the KBID certified acres base. I would say very -- I'm not aware of any personally. I guess I can't say there isn't some, but it's certainly not widespread or significant, like some other areas. The conservation reserve enhancement program was not eligible in that area, so that did not exist. So you know, I can't think of any others, per se, in terms of crop assistance programs other than just kind of the normal. You know, obviously people can take insurance if they choose to, and farm programs are quite complex and, you know, there could be some applicability, but I can't speak to that.

Q. I'm going to give you what we'll mark as Exhibit 14, which is actually technically one from your deposition. I'm going to see if this refreshes your recollection generally about the kind of thing we're talking about with the reclamation program.

(Whereupon, Barfield Deposition Exhibit Number 14 was marked for identification by the reporter.)

Q. (By Mr. Wilmoth) Could you take a quick look at that letter and familiarize yourself and identify it, if you can?

A. Well, I certainly see that it's a letter to Governor Kathleen Sebelius from Fred Ore, the Missouri manager of Reclamation at Grand Island, apparently at that time. This is dated February 14, 2003. I think this fits with my general recollection of the issue as we just discussed a minute ago.

Q. And this refers to the reclamation state's Emergency Drought Relief Act?

A. That's correct, as I read this letter.

Q. As you mentioned, the date on this particular letter is February 14, 2003. Do you recall if the state of Kansas took advantage of this program in 2003 or '-4, '-5 or '-6?

A. I can't say by year for certain. I think there was participation to the extent they could in at least some of the years.

Q. Let me give you what will be Exhibit 15.

(Whereupon, Barfield Deposition Exhibit Number 15 was marked for identification by the reporter.)

Q. (By Mr. Wilmoth) This document is kind of following on the theme we've been discussing.



If you could just briefly identify that.

A. And what was your question?

Q. My first request is if you could identify that document.

A. It's a letter to Jack Wergin of the Bureau of Reclamation, Grand Island, dated April 18, 2005 from Tracy Streeter who was director of the Kansas Water Office.

Q. And there's a bullet point in that letter. I'd like to ask you about it. Halfway through that bullet point it says essentially, if I'm interpreting it correctly that, KBID is requesting consideration that it be compensated for not calling for water in the 2005 irrigation season?

A. Essentially says that, I believe, yeah. That was for Kansas-Bostwick, Kirwin and Webster Irrigation Districts.

Q. Do you have any recollection of whether or not KBID left water in Harlan County in 2005 pursuant to this request or any other program?

A. I can't say for sure on how this all played out. This was handled by the Kansas Water Office, and so I can't say for sure.

Q. In your experience, would that have been

something that would have been contemplated or not uncommon between 2003 and 2007?

A. I think the districts, in general, and all of them, the ones named here, Kansas-Bostwick and Kirwin and Webster, were very short of water, had been through a period of shortages. Reclamation offered some assistance, and at least some of the districts agreed to participate or asked to participate through the program that's described here. Exactly what they did and how much it mattered, I note here that they were projecting six-tenths of a foot in Harlan County if they took no water. So this was not a real significant thing in regard to the water side of it.

Q. Do you have any opinion as to what that volume would translate to, six-tenths of a foot in Harlan County in terms of acre feet, how much water that might be?

A. Not right off the bat. I would have to look at the capacity table and do the math, but it doesn't strike me as a real big amount. Probably depending a little bit on what Nebraska-Bostwick District would do, also, given the shared nature of storage under the consensus plan between the two districts.

Q. Were you involved in any modeling

related to the compact or was that left for one of your staff?

A. During what period?

Q. During 1998 to 2007.

A. I wasn't personally involved in regard to technical aspect of modeling. I would have been involved in regard to reviewing results during the course of the settlement process and evaluated those circumstances in regard to a process that we're involved in.

Q. Did you work with the engineering committee to develop the model in detail? I mean, were you intimately involved in that?

A. Involved enough to understand what was being modeled. The provisions that related to the settlement and the calibration targets. All of the key parameters that were components of the settlement as described in the modeling report and FSS. So to the extent of results and what we were agreeing to and things of that nature, I was certainly well aware of the modeling piece and how important it was. In terms of crunching the numbers and any technical aspect of that I was not, but certainly pieces, parameters and things that were included in the model were things of discussion.

Q. Okay.

A. So judgments could be made in terms of what we would do.

Q. Were you involved in developing the accounting procedures?

A. Probably in a similar analogous way. Not in terms of so much the explicit writing of them or detail. I relied a lot on Mr. Barfield, Mr. Book and others, but again, significant issues in materials of how things would be done, this was an in-depth process and I was involved in essentially every critical decision through the process and some not so critical. Quite a few.

Q. Too many. Right? Were you involved in the changes to the accounting procedures in 2005?

A. I was actively involved as a member of the RRCA from Kansas. We certainly reviewed the changes, relied a fair degree on our engineering advisors and committee, so I sort of knew what was happening up there, but again, didn't do the nuts and bolts, but yes, I was certainly well aware of what they were doing and the importance of the rules and regulations that had been promulgated by the RRCA and took a great care in regard to the fact that any changes in accounting procedures would also require change in

the rules and regulations by the RRCA.

Q. What is your recollection of why those changes occurred in 2005?

A. The committee was asked to -- the engineering committee was asked to do a pretty comprehensive review of the accounting procedures, as I recall, to clean up any issues that had come to their attention subsequent to the approval of the FSS, which in my lingo includes the exhibits. They're a part of the overall package. And to resolve any -- any issues that had come up so as to try to fix those problems by agreement and largely, the committee and the RRCA was able to come to an agreement on some that they thought could be improved. That was a process that was envisioned at the time of the FSS.

Q. So under the accounting procedures today, you're still familiar with the current accounting procedures?

A. Well, in general terms. You know, I know the nuts and bolts of it. I know the overall premise of them. Maybe not every technical detail.

Q. Let me see if I can create a general situation. Under the current accounting procedures, if we had an irritation system that

converted a thousand acre feet and 40 percent of that was assumed to be return flow under the current accounting procedures, is that how return flow is typically dealt with, there's an assumed returned?

A. It's dealt with slightly different ways for different types of systems. Where there was data and measured values like, for example, on some of the reclamation projects, that is translated into the accounting. Where there was not as much information and individual pumps and things of that nature, some engineering estimates were made in regard to the amount of the return flows and those are factored into the accounting formulas.

Q. So is it fair to say that in your typical situation on any particular diversion, you would want to make sure that the consumptive benefit -- the computed beneficial consumptive use associated with that diversion, plus the return flow, those numbers, you would want those numbers to add up to the diversion amount, would you not?

A. The accounting formulas, accounting procedures were an attempt to look at all of the different variables that affected the system, so that virgin water supplies could be calculated based on a

series of inputs and computed -- beneficial consumptive use could be computed and ultimately so adjusted allocations could be made and ultimately compliance could be determined. It was all a product of a, frankly, a negotiated system that looked at the information that was available and the knowledge base that was embodied in the people involved, and they made judgments in terms of a system of accounting procedures that were then agreed to by the parties.

Q. Under my hypothetical, trying to determine how the accounting procedures would treat this situation, the diversion was a thousand acre feet.

A. Okay.

Q. The canal. The return flows are assumed to be 40 percent?

A. Okay.

Q. What should the CBCU be?

A. I think in that example you gave, the CBCU would be the 600 acre feet.

Q. And in that example, if we somehow came up with 500 acre feet, there would be some volume of water that was not accounted for. Correct?

A. All the water in the system is accounted for one way or the other. You might have -- you could

pull out an explicit individual diversion and go into the field, perhaps, and measure the diversion on a given day or a even a week or a month, and measure at least part of the return flows to measure waste. You may not been able to measure all of them because some of them seep into the groundwater, but you could measure some things. But you're not going to absolutely know that number in most cases. If there is more in one place and less in another, then lower gauges and lower processes take that into consideration. You know, you could have a hypothetical, but it doesn't move anything.

Q. There are a number of variables, obviously, I understand, but again, getting back to my hypothetical. If what I'm hearing you say, if I'm understanding you correctly, the closer you get to that 600 number, the more accurate you were in terms of the actual impact to the system?

A. In a theoretical sense, the closest you get to what the real computer generated beneficial consumptive use is or the real beneficial consumptive use is, of course, the closer everything will track together. I guess my point is that not everything, every single acre foot of water that moves from Point A to Point B is measured.



Q. So you're saying can't?

A. Not every single acre foot is or cannot be measured. So there's a certain degree. You say you want to get to that 40 percent. The real issue is what value to use because it may be 38 percent one year and 41 the next.

Q. And do you think as a general principle that it is important to account for that water, as best you can?

A. As best you can, right. That was the goal of the development of the accounting systems and all the other components of the system that was agreed upon.

Q. Okay. Can we talk just a little bit about the lands below KBID?

A. Yes.

Q. Are you familiar generally with the kind of uses that are occurring below KBID?

A. Up close and personal. When you issue orders to hundreds and hundreds of water users, your phone rings once in awhile.

Q. I would imagine so. Can you give me some general breakdown of what those uses are? How much is irrigation and how much is municipal? Just ball park figures, please.

A. Well, it has been awhile, but there are -- first of all, there are a substantial number of direct surface diversions from the river, from the state line down to Milford Reservoir. I would call those individual pumpers rather than ditch systems. Mr. Ross would be more up to speed in terms of the number. Fifty, a hundred, I don't know exactly how many, and that their supply is variable depending on the water in the system.

Q. Are these irrigators relative to KBID are they more or less efficient or equally efficient in their use?

A. Obviously it depends on the user, but most of these would pump from the river into some sort of a piped system. Typically, for a number of years now, at least into some pivots or some flood land gated by pretty efficient, relatively efficient, but there's certainly water conveyed and when you pump from the river itself there's some challenges associated with that.

Q. Physical challenges?

A. Well, in terms of the variability of supply, capturing the water. I've stepped across the river numerous times during the period in question. I mean that literally, stepped across it, so sometimes pumps

don't work real well when you have that small amount of water. The system includes some five, six hundred what I would call alluvial wells.

Q. This is the system below KBID?

A. Below KBID or from the state line, at least, some of which would be, I guess, downgraded, some not with KBID, per se, but a lot of them would be downgraded. Some fairly heavy irrigated areas, particularly the Concordia area, the Clay Center area and through there and down towards the Milford Reservoir. Those are irrigation wells. There's also wells for each of the communities along the system. Cities like Concordia, Belleville, which is off the water itself, but it gets water near it. The various towns that go through down big and small. None of them are big, but down through there. And other, you know, special industrial, but irrigation is the big use in that reach. Those are users that convert either surface water or groundwater. In some cases both.

Below them is Milford Reservoir, which is a Corps of Engineers project, and one that has multiple purpose benefits under the authorized purposes for the lake and water supplies is a big component, as well as flood control, recreation, things of that

nature, and it, in turn, then -- the water supply feature for users downstream on the Kansas River. I don't know how far you want me to describe the situation.

Q. That's enough. Let me ask you just a couple of questions. I'll back you back up the river. You mentioned there were five to six hundred alluvial wells in the system?

A. As I recall, that range.

Q. Do you have any opinion about the impact of those wells on them?

A. Impact of the wells on the system?

Q. The hydrologic impact of the wells.

A. They're pretty closely connected hydrologically to the river system. We administered on that basis of our understanding of the system and the studies. We actually administered the alluvial groundwater wells essentially as if they were surface rights. So when we curtailed junior water rights in the area and the exact methodology varied, but we curtailed wells as well. So there was a system of curtailment in effect certainly from the 2000 -- I can't remember exactly when it started, but the 2002 on through. Right about the time I left my job.

Q. Okay. And typically in these alluvial

well fields, the capture of that water by one or more of the wells, how does that affect return flow from irrigation?

A. Depends on where the wells are. Some of the upland wells out of their alluvial valley may have captured some return flows from the Bostwick project. Some -- a lot of the wells, the vast majority of the wells in my description a moment ago are wells in the alluvial valley of the Republican River, so I don't know that I would say that they were capturing return flows other than in a very indirect sense, because it's a pretty good alluvium and so they would largely be pumping from the storage in the alluvium which would fluctuate with wet years and dry years and water supply from the river, things of that nature.

Q. When the individuals in the alluvial well fields are pumping that water and then reapplying it, is there a cycle there? Did they tend to recapture the water they apply on the land or does that water bypass those wells?

A. I'm not sure I can respond to that question. If you look at an individual irrigator that has a well, let's say, in the alluvial valley, then the amount of return flow would depend on the nature they use and how they operate it. There would be some

limited return flow back to either the river, if they're very close, or to the groundwater system itself. Typically the people down there that used pivots, there's not a lot of returns. They're pretty efficient, especially with the prescriptions that were in place during this period of time. These are people that oftentimes had 50 acre feet for center pivot to pump, or something of that nature, because of the restrictions in place.

Q. Okay.

A. I mean, just to pick a number out of the air, but really, these were not large applications because of the water supply available, the regulatory restrictions.

Q. Sure. During your tenure at KDWR, did you often administer rights under what I refer to as the abandonment and forfeiture doctrine? Are you familiar with abandonment and forfeiture as a concept in law?

A. It's a concept in law in Kansas.

Q. Did KDWR actively enforce those laws?

A. There were quite a number of forfeiture actions taken during my tenure there. It probably was -- I would not say that every single right for which there was a question was pursued just simply

because of manpower.

Q. You didn't want to get any more phone calls?

A. Well, that's okay. But it's more a question of resources and our determination on an initial cursory level in terms of whether there was due and sufficient cause for non-use. Our law and our regulations embody a series of reasons that are allowed as doing sufficient cause for non-use of water, and so we tended to focus on those where there was no apparent reason for doing sufficient cause from a cursory review and then looked at the resources that were available and then pursued those, but yes, there were hundreds and hundreds of more than that over a period of time, depending on what period you want to talk about, of cases that were taken throughout the state.

Q. And how did you, when you engaged in those activities, did you typically -- did you typically evaluate the uses over some period of time to determine what use was being made?

A. And you're referring to the forfeiture aspect?

Q. Correct.

A. Well, the statute was at some point amended

to a period of five years of successive non-use without good cause would constitute forfeiture or abandonment of the right. At one point in time years ago it was three years. So you would certainly have to have a five successive years or five consecutive years before there was a legal question at all. Then beyond that, it becomes a question of what constitutes due and sufficient cause. A period of good cause interrupts a five successive year of non-use. You could have a period where there might be several years of non-use and then might get interrupted by a good cause year, even though no water was used and the right would still be in good standing.

Q. So let me ask you this. Let's assume you were engaged in one of these proceedings.

A. Okay.

Q. And there was a period of ten years that you evaluated.

A. Okay.

Q. The individual's water right authorized 10 acre feet.

A. Okay.

Q. Annually.

A. Okay.



Q. In the first three years the water user used 5 acre feet?

A. Each year?

Q. Each year. No use in the fourth year. In the fifth year 10 acre feet was used. No use in the sixth year, and in the seventh, eighth and ninth and tenth year 5 acre feet were used annually. In your procedures, how would you have quantified that right under the abandonment and forfeiture laws?

A. There would have been no applicability of the forfeiture law to that particular example.

Q. So the individual would be entitled to irrigate utilizing 10 acre feet?

A. If the right was authorized for 10 acre feet, that's correct. There would have been no -- there was no forfeiture applicability there.

Q. Let me talk to you just briefly about the Milford Reservoir.

A. Okay.

Q. You mentioned that there were some municipal and industrial uses made from Milford?

A. Yes.

Q. And who are the users of that water?

A. The state of Kansas through the Kansas Water

Office has contracted with the Corps of Engineers, federal government, for the conservation water supply storage in the lake. That's a long-term, like 40 or 50 year contract. The water office then operates two programs, a water marketing program, where individual municipal industrial users can seek contracts from the water office for water from that storage.

And secondly, they operate -- there is a program called the Kansas River Water Assurance Program where a series of essentially all of the industrial municipal users in the Kansas River Valley, from Junction City down to Confluence, are members of that district. It's a mandatory program once the district is established, and then that district, which is a political subdivision of the state of Kansas, contracts with the water office for storage as a group. So that releases then are made from the lake to provide municipal industrial water in answering full benefits so the quality of water is adequate to drink.

In regard to the specifics, there are individual contracts with West Star who operates Jeffrey Energy Center, so they have an intake in the Kansas River and water can be released -- can and has been released from Milford to ensure that they can

divert water to the power plant. They're also a member of the Assurance District, so that has made their individual contract not needed as much, but it's still used, and then the -- so in essence, what you end up with is Junction City, Manhattan, Topeka, several industries, Lawrence, the Johnson County Water District, which is half million people or so in the Kansas side of the Kansas City metropolitan area or public utilities on the Wyandotte County side. So a lot of folks drink from the Kansas River.

Q. And what does that water sell for?

A. There's a price established based on the terms of contracts, and depending on the contract, some of those are fixed. The older ones, some are variable rate contracts where the rate is set annually by the Kansas Water Authority. Probably run in the range of 50 to 20 cents per thousand gallons purchased at the lake. I would have to check the specifics. It may be higher than that by now, but that's the number that kind of runs in my mind.

Q. Is that what are fully allocated now?

A. I haven't tracked that for quite some period of time, but to my knowledge, not a hundred percent. The Water Assurance District is a pretty big customer, and they have, essentially, an option to

secure additional water to meet their long-term growth, but I can't tell you whether a hundred percent of the lake is contracted to the water office, so they're making -- they're legally committed and they're making principal and interest payments and paying the pro rata share of the operation and maintenance for the lake. So in that sense it's a hundred percent contracted. Whether they have sub-allocated that on to other users is a different question, and that's where I was hedging a little bit. I don't think that necessarily a hundred percent is totally sold.

Q. And obviously you're intimately familiar with your current position and former position with Missouri river operations?

A. Yes.

Q. Is it the case occasionally the Corps of Engineers will release water from the Kansas River system to augment stream flow in Missouri for navigational purposes?

A. Yes.

Q. How does that affect levels at Milford?

A. The Corps of Engineers and the state of Kansas have had a long running disagreement in regard to that particular issue. Certainly not speaking for

either party in this form. The effect on Milford is that the Corps' view, as I would understand it, that water that has not currently been called -- what they call called into service is available for them to release at their discretion and they occasionally do so. Now, there are some restrictions in the operating manuals in terms of how far they can pull the lake down, but within that distance and this water not called into service category, they can and have released water down the Kansas River to help supplement the flows of the Missouri River in Kansas City.

Q. Forgive my giggling on the called into service. That sounds like a Corps term. Don and I worked at another base and as an aside, water that flows down the river to our client in the state of Florida is, quote, unquote, lost to the ocean, according to the Corps.

A. Yeah. Well, and as I mentioned what I understood to be their position, I would just simply note that the state of Kansas hasn't really agreed with the Corps on that matter.

Q. Sure. Sure. Do you know if water was called into service by the Corps in 2005 and/or 2006?

A. Well, the term called into service was -- the state had called the water into service for its purposes, but in terms of the corporation releasing it, if that's your question, I can't recall explicitly which years they did or did not make releases for that purpose.

MR. WILMOTH: Okay. I think I'm going to defer to my esteemed colleague, Mr. Ampe.

MR. AMPE: I don't have any questions.

MR. WILMOTH: I might have one. Just one last question.

Q. (By Mr. Wilmoth) Do you know, Mr. Pope, if those contracts at Milford were entered into under the 1958 Water Supply Act?

A. It's my understanding that the contract between the Corps and the state of Kansas through the water office is a '58 water supply contract.

Q. And so essentially what that -- is it your understanding that that means the water supply was reallocated or water was reallocated to a water supply purpose in the reservoir?

A. My understanding is that it was originally authorized and allocated as a water supply purpose. The state simply -- well, it was always intended to

be water supply, and I believe the state provided an assurance at the time the lake was built that, indeed, it would contract for the observation water supply storage. It wasn't an after the fact, and there have been cases like that in other lakes where it's reallocated later. But in this case it was part of the original plan and the state said yes, if you build it, we will contract for the storage. They built it and contract -- and then the state did contract for storage. So it's the way it's theoretically supposed to be done and isn't very often.

Q. No, it's not.

A. I'll stop there. There's lots of things I would love to say about that, but this is not the time or place.

MR. WILMOTH: I don't have anything further, gentlemen, unless you do. I appreciate your time very, very much.

MR. DRAPER: No questions.

(Witness excused.)

\_\_\_\_\_  
DAVID L. POPE

STATE OF \_\_\_\_\_)

) SS:

COUNTY OF \_\_\_\_\_)

Subscribed and sworn to before me this \_\_\_\_\_  
day of \_\_\_\_\_, 2009.

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires: \_\_\_\_\_.

In re: Non-Binding Arbitration



C E R T I F I C A T E

I, JANE A. BLACKERBY, a Certified Court Reporter within and for the State of Missouri, hereby certify that the within-named witness was first duly sworn to testify the truth, and that the deposition by said witness was given in response to the questions propounded, as herein set forth, was first taken in machine shorthand by me and afterwards reduced to writing under my direction and supervision, and is a true and correct record of the testimony given by the witness.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, or relative or employee of such attorneys or counsel, or financially interested in the action.

WITNESS my hand and official seal at Kansas City, Jackson County, Missouri, this 28th day of February, 2009.

---

JANE A. BLACKERBY, RPR, CCR No. 877

Certified Court Reporter